COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
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April 24, 1996

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

Re: In the Matter of Policy and Rules
Concerning the Interstate, Interexchange
Marketplace, CC Docket 96-61

Dear Secretary Caton:

Enclosed for filing please find an original and 11 copies of the comments of the Pennsylvania Public Utility Commission to Sections III, VII, VIII and IX of the Commission's above-referenced Notice of Proposed Rulemaking.

Respectfully submitted,

Alan Kohler
Assistant Counsel

Counsel for the Pennsylvania
Public Utility Commission

Enc.

cc: Janice Myles, Common Carrier Bureau (w/diskette)
International Transcription Services, Inc.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054

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| In the Matter of | : | |
| | : | |
| Policy and Rules Concerning the Interstate, Interexchange Marketplace | : | CC Docket No. 96-61 |
| | : | |
| Implementation of Section 254(g) of the Communications Act of 1934, as amended | : | |

# INITIAL COMMENTS OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION TO THE NOTICE OF PROPOSED RULEMAKING REGARDING INTEREXCHANGE SERVICE, SECTIONS III, VII, VIII AND IX

## I. INTRODUCTION

These comments are submitted on behalf of the Pennsylvania Public Utility Commission (PaPUC) in response to the Commission's Notice of Proposed Rulemaking (NOPR), released March 25, 1996, as captioned above. The NOPR seeks comments on a wide variety of issues pertaining to implementation of the Telecommunications Act of 1996 (1996 Act) pertaining to the domestic long-distance market. The NOPR divides these issues into nine specific sections. In the NOPR, the Commission gives interested parties the opportunity to file two sets of comments -- one set for Sections IV, V and VI, and the other set for the remaining sections of the NOPR.

On April 19, 1996, the PaPUC filed initial comments with the Commission addressing Sections IV, V and VI of the NOPR. These initial comments are submitted in response to the remaining sections of the NOPR. While the PaPUC is filing two sets of

initial comments at this docket as directed by the Commission, the PaPUC points out that the issues addressed herein are closely related to the issues addressed in its April 19, 1996 comments and requests the Commission to view these comments as supplemental to the PaPUC's original set.

## II. SUMMARY OF PaPUC's SUBSTANTIVE ARGUMENTS

The Commission proposes to exercise its recently created forbearance authority to eliminate tariff filing requirements for non-dominant carriers. The PaPUC recommends that the Commission refrain from exercising its forbearance authority in the tariff filing area at this time.

As a prerequisite to exercising forbearance, the Commission must find that the requirement in question is unnecessary to ensure just, reasonable and nondiscriminatory rates, to protect consumers and is otherwise in the public interest. Particularly pertaining to interexchange service to aggregator telephones, none of the three required findings is justified. Operator service provider type services remain noncompetitive in that competitive controls do not adequately assure quality service at reasonable rates. Accordingly, regulatory tools, like tariffs, remain necessary to protect consumers from price gouging activities.

Other interexchange services by non-dominant carriers should also remain subject to tariffing requirements. Tariff disclosure is an essential element of federal regulation for state commissions and state consumer advocates' offices. Despite the Commission's

tentative conclusions to the contrary, the filing of tariffs may have no effect, one way or the other, on tacit price coordination activities by interexchange carriers. Instead of exercising absolute forbearance, the Commission should evaluate ways to reduce paperwork and otherwise streamline the tariff process through, for example, use of electronic mediums.

The PaPUC agrees that tacit price coordination remains a concern but strongly believes that neither reclassifying AT&T nor detariffing non-dominant carriers will assist in decreasing this activity. As to bundling of customer premise equipment with other services, the PaPUC recommends that the Commission proceed with great caution given the experience with this type of joint marketing in the cellular and shared tenant service markets.

## III. DISCUSSION

### A. Non-Dominant Carrier Tariff Forbearance (Section III)

The 1996 Act gives the Commission the somewhat unique and potentially far-reaching authority to forbear Commission and industry compliance with provisions of the Communications Act. The Commission is essentially delegated authority to waive statutory provisions under certain very limited circumstances as expressly addressed in the 1996 Act. Section 401 of the 1996 Act provides as follows:

SEC. 401. REGULATORY FORBEARANCE.

Title I is amended by inserting after section 9 (47 U.S.C. 159) the following new section:

"SEC. 10. COMPETITION IN PROVISION OF TELECOMMUNICATIONS SERVICE.

"(A) REGULATORY FLEXIBILITY.-Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that-

"(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

"(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

"(3) forbearance from applying such provision or regulation is consistent with the public interest.

"(B) COMPETITIVE EFFECT TO BE WEIGHED.-In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers.

Accordingly, prior to exercising regulatory forbearance in any given instance, the Commission is mandated by Congress to make three specific findings or determinations. The PaPUC strongly believes that the required findings warrant very serious consideration.

In its NOPR, the Commission tentatively concludes that Section 401's required findings are met pertaining to the Commission's tentative proposal to eliminate non-dominant carrier tariff filing requirements. The Commission suggests that just, reasonable and

nondiscriminatory rates can be achieved effectively by replacing the traditional tariff system with "market forces and administration of the complaint process." NOPR page 19, para. 28. Furthermore, the Commission tentatively concludes that non-dominant carrier tariffs are not necessary for the protection of consumers and that forbearance is consistent with the public interest. The basis for the Commission's conclusion is that these tariffs decrease the benefits of competition to interexchange service consumers by promoting tacit price coordination since competitive pricing strategies are a matter of public record. Finally, although not specifically expressed, the PaPUC senses a desire by the Commission to reduce its own administrative burdens -- an objective the PaPUC can readily understand.

Historically, the tariff has been the foundation of the regulation of utility rates on both a state and nationwide basis. While tariff procedures have served the Commission and the state commissions well, the PaPUC is the first one to acknowledge that the role of tariffs is evolving quickly as the telecommunications industry becomes more and more competitive -- particularly in the interexchange industry.

In Pennsylvania, in 1993, the Pennsylvania General Assembly deregulated the rate and earnings regulation of the vast majority of interexchange services[1] through enactment of Section 3008 of the

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[1] The only exceptions to rate deregulation are interexchange services to aggregator telephones (operator service provider (OSP) type services) and optional calling plans in furtherance of extended area service (EAS) programs which the Pennsylvania General Assembly found were non-competitive in nature. 66 Pa. C.S.

Public Utility Code, 66 Pa. C.S. §3008. However, Section 3008(b) provides that, "The commission [PaPUC] may require that the interexchange telecommunications carriers file and maintain tariffs or price lists for competitive telecommunications services." Within this context, the PaPUC has continued to require the filing of IXC tariffs, although rate regulation of most IXC services has been eliminated.

The PaPUC believes the policy implemented by the Pennsylvania General Assembly is a wise one. While the PaPUC acknowledges that rate regulation may no longer have any place in many interexchange markets, particularly for carriers with non-dominant market shares, the PaPUC believes that tariffs, or price lists if you prefer, still have their place in today's regulatory environment and, in many instances, can save significant time and resources for regulators.

The PaPUC recommends to the Commission that it refrain from the urge to completely forbear non-dominant carrier tariff filings and adopt an approach similar to that used in Pennsylvania at the present time. First, at a bare minimum, the Commission should continue to tariff interexchange services provided to aggregator telephones, regardless of the carrier. While the Section 401's required findings are at least arguably present for "1+" type markets, no such reasonable conclusion can be drawn by the Commission for "0+" type markets.

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§3008(a).

It remains the case in aggregator markets that competition does not place adequate competitive controls on end user rates for the simple reason that profits are shared between carriers and their aggregator customers. Accordingly, market incentives tend to exert upward pressure on rates as carriers compete for aggregator business not end user business. Since aggregators are primarily interested in higher commissions, attracting aggregator business frequently requires exorbitantly high rates. Furthermore, carriers which compete in both aggregator and non-aggregator markets are tempted and, in the PaPUC's view, engaging more and more in cross-subsidization strategies, focusing on higher margins in non-competitive aggregator markets and, in doing so, subsidizing competitive services with non-competitive service revenues.

To the best of the PaPUC's knowledge, the Commission continues to receive large numbers of consumer complaints against widespread price gouging activity in OSP markets. While most states, including Pennsylvania, have made some attempt to cap OSP rates, the Commission has not and interstate OSP rates remain exorbitantly high. Clearly, neither the marketplace nor the Commission's complaint procedures have been effective in controlling rates in OSP markets. While a tariff does not control OSP rates in and of itself, the PaPUC believes that the tariff remains an essential regulatory tool in analyzing and understanding the OSP rate problem so that it can be addressed effectively, if appropriate. In any case, the prerequisite findings for Commission forbearance are

clearly not met in the provision of interexchange service to aggregator telephones.

Likewise, the PaPUC believes that tariffs, or, if the Commission prefers, rate schedules, remain a very valuable regulatory tool for all IXC services including those provided by non-dominant carriers. Tariffs are the only effective way that state commissions and consumer advocates' offices can monitor interstate prices and evaluate interstate, interexchange markets. Furthermore, tariffs will become an even more valuable tool for the Commission in carrying out some of the new provisions of the 1996 Act -- for example, the Section 254(g) rate averaging requirement addressed in the PaPUC's first set of comments at this docket.

Additionally, it appears to the PaPUC that the Commission's tentative finding that tariffs or price schedules cause, or even contribute to, tacit price coordination between non-dominant IXCs appear to be misplaced. The PaPUC acknowledges the fact that in order for there to be tacit price coordination between carriers, pricing levels and strategies must be readily identifiable between competing carriers. However, the PaPUC doubts that tariffs play any significant role in this process.

The fact of the matter is that if carriers find it profitable to engage in price coordination activity, they will do so -- unless prohibited by the regulators. It is well known to all that carriers engage in continuous competitive intelligence activities to remain informed on a real-time basis regarding competitive price levels. Furthermore, there are a wide variety of consulting groups

which make themselves available to assist carriers in these activities, if needed. Finally, periodicals like the McGraw Hill DATAPRO publication provide in-depth information regarding pricing elements throughout the industry. Overall, real-time information regarding price levels for IXC services are readily available to carriers in a variety of formats,[2] with or without tariffs. Accordingly, the PaPUC strongly disagrees with the Commission that continuing to require non-dominant carrier tariff filings will have any effect -- good or bad -- on tacit price coordination activities within the interexchange industry.

Finally, the PaPUC is not convinced that detariffing of non-dominant carriers is consistent with increases in administrative efficiencies and decreases in administrative burdens. The 1996 Act clearly charges the Commission with continued responsibility to monitor and enforce the provision of the Communications Act on the interexchange industry. Indeed, under the 1996 Act, the Commission has several new statutory responsibilities -- most notably in the area of the rate averaging requirement. Without tariffs or rate schedules, the Commission will likely find itself in constant activity requesting information from the industry in the form of data requests or other procedures. Furthermore, more reliance on complaint procedures can only mean an increase in litigation and an

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[2] The PaPUC has observed that carriers voluntarily keep their competitors informed of their price changes and price strategies through copying each other on price change notices or tariff supplements. Clearly, if carriers insist on voluntarily sharing price changes and price strategies, tacit price coordination will remain a characteristic of the market with or without tariffs.

increase in the time and resources required of the Commission to administer such litigation activity. Without thoughtful consideration, the Commission may actually increase its administrative burden through actions designed to decrease its administrative burden.

Instead of exercising absolute forbearance, the Commission should evaluate ways to reduce paperwork and in doing so, save valuable time and resources. The Commission should consider implementation of a completely electronic tariff or price schedule filing system in which tariff charges could be imputed electronically and accessed through outside databases like, for example, LEXIS/NEXIS. The Security and Exchange Commission's EDGAR program is an example of an electronic filing format which the Commission might consider. Such action by the Commission would be certain to decrease regulatory burdens on the Commission and the industry, maintain useful regulatory tools necessary to protect consumers and otherwise protect the public interest. If after some meaningful experience under the new regulatory environment created by the 1996 Act the Commission believes that further regulatory reform is necessary, the Commission should consider forbearance of non-dominant carrier tariffs at that time.[3]

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[3] In Section III, the Commission also requests comment on whether AT&T's voluntary commitments to secure non-dominant carrier status should remain in effect. The PaPUC recommends that the Commission maintain these commitments as desirable safeguards. Succinctly put, "A deal is a deal." This is particularly true since AT&T is just barely a non-dominant carrier as evidenced by its recent reclassification.

B. Pricing Issues (Section VII)

Consistent with the PaPUC's prior discussion, the PaPUC acknowledges that tacit price coordination is an undeniable and continuing characteristic of the nation's interexchange marketplace. The PaPUC strongly disagrees with the Commission that the reclassification of AT&T as a non-dominant carrier or the detariffing of non-dominant carriers will have any measurable effect on the level of tacit price coordination. Overall, if carriers find it more profitable to coordinate their pricing activity rather than engage in truly competitive pricing, carriers will, without much difficulty, find ways to coordinate pricing activities, with or without public identification of prices.

Whether such activity will be decreased or eliminated by BOC entry into the interLATA market remains to be seen. The PaPUC has observed that tacit price coordination in lntraLATA markets has continued even where a BOC and IXCs have engaged in head-to-head competition.

Acknowledgement by the Commission that tacit price coordination continues is another reason that the Commission should maintain non-dominant carrier tariffs in order to monitor this activity. Only when the 1996 Act is fully implemented and competition is fully developed in all markets will the need for these valuable regulatory tools be eliminated.

C. Bundling of CPE (Section VIII)

Since 1980, the Commission has implemented and enforced a general rule prohibiting the billing of the sale or lease of

customer premises equipment (CPE) with the provision of common carrier telecommunications services (CCTS). The PaPUC believes that while there may be some benefit to consumer competitive options in eliminating the bundling prohibition, the Commission should exercise great caution prior to taking such action.

Experiences in the cellular and shared tenant service (STS) markets provide historical experience that allowing joint marketing of CPE and CCTS in the name of increasing competitive options can also increase competitive abuses. In the cellular market, the bundling of cellular telephones and cellular services has caused customer confusion, leading low-volume customers to enter into long-term contractual arrangements to the severe detriment of development of the cellular retail market. In the STS market, the PaPUC has encountered frequent abuse caused by, in this case, sophisticated, high volume customers, accepting unconscionable lease terms on CPE in order to take advantage of what appear to be worthwhile discounts on CCTS.[4] If sophisticated, high-volume customers are susceptible to such competitive dealings, one can only imagine the potential exposure for unsophisticated residential customers. At a bare minimum, the Commission must require carriers to offer unbundled service offerings along with any bundled service offerings which are permitted.

It is important for the Commission to understand and take into account that the transition to full-scale competition in all

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[4] The Philadelphia courts have become the setting of many, many lawsuits between STS providers and their business customers involving disputes caused by the bundling of CPE and CCTS.

markets will be a very confusing scenario for consumers. Competitive choices are only good for consumers if they understand their choices at a level which allows them to exercise wise purchasing decisions. While joint marketing or bundling of services may be an essential component of a fully competitive environment, the Commission should allow various marketing options to be presented to consumers very gradually to allow the sophistication of the marketplace to develop at, at least, a comparable level to the pace of the development of competition. Otherwise, the transition period from regulation to competition will be a nightmare for consumers.

While the PaPUC applauds the Commission for considering innovative ways to bring increased competitive choice to consumers, the PaPUC recommends that the Commission take this issue under advisement to allow for a more gradual consumer transition to the competitive environment. Once consumers become somewhat accustomed to increasing competition in all markets, historic restrictions, like the CPE/CCTS bundling prohibition, will no longer serve any valid purpose and should be lifted at that time.

D. Other Issues (Section IX)

In Section IX of the NOPR, the Commission has raised a variety of less visible issues for which it requires comment at this time. The PaPUC will not comment on these issues in its initial comments but reserves the right to address these issues in its reply comments.

## IV. CONCLUSION

The PaPUC appreciates the opportunity to provide comment in this important docket and requests the Commission to adopt rules consistent with the discussion herein. The PaPUC looks forward to participating in the reply comment stage of this proceeding following the submission of comments by all interested parties.

Respectfully submitted,

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